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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID SCHWARTZ,

Defendant and Appellant.

B301455

(Los Angeles County
Super. Ct. No. BA436783)

APPEAL from an order of the Superior Court of
Los Angeles County, Craig Richman, Judge. Affirmed.

Mow Law Firm and Chandler A. Parker for Defendant and
Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Noah P. Hill and Steven E. Mercer, Deputy
Attorneys General, for Plaintiff and Respondent.

David Schwartz appeals from the trial court's order denying his motion to offset the amount of restitution he was ordered to pay victim Patrick Valdez following Schwartz's entry of a negotiated plea to the offense of making a place available for the manufacture, storage, or distribution of a controlled substance. Schwartz had used the building he leased from Valdez to manufacture and grow marijuana, and in 2015 the equipment Schwartz used for his marijuana business exploded and caused a fire, damaging Valdez's building. Schwartz contends he is entitled to an offset for the amount Valdez's insurance company paid Valdez for the damage because the lease agreement required Valdez to obtain insurance to cover damage to the building. Because Schwartz did not pay for or obtain the insurance policy, and he was not a named insured under the policy, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*A. The Warehouse Lease and Explosion*¹

On June 30, 2014 Schwartz entered into a one-year commercial lease agreement (lease) with Valdez to lease a 2,400 square foot warehouse located in Maywood, California. Section 3 of the lease prohibited Schwartz from using the warehouse "for the purposes of storing, manufacturing or selling any explosives, flammables or other inherently dangerous substance, chemical, thing or device." Section 27 of the lease provided that Schwartz "shall comply with all laws, orders, ordinances and other public

¹ The facts are taken from Schwartz's motion to offset his restitution obligation and the supporting documents.

requirements now or hereafter pertaining to [Schwartz's] use of the Leased premises."

Section 8.B of the lease required Valdez to "maintain fire and extended coverage insurance on the Building and the Leased Premises in such amounts as Landlord shall deem appropriate." However, under section 8.A, "[i]f the Leased Premises [are] damaged by fire . . . resulting from any act or negligence of Tenant[,] Tenant shall be responsible for the costs of repair not covered by insurance." In accordance with his obligations under the lease, Valdez maintained a \$1 million insurance policy on the commercial building, which covered damage caused by fire. The named insureds were Valdez and Christopher Lee. Schwartz did not pay any of the insurance policy premiums.

Schwartz used the leased warehouse to manufacture and grow marijuana. On January 23, 2015 an explosion and fire occurred on the property caused by the equipment used by Schwartz to manufacture and grow marijuana.

B. *The Plea Agreement and Stipulation To Pay Victim Restitution*

Schwartz was charged with five felonies arising from his marijuana growing business and the fire. On May 23, 2016 he entered into a negotiated plea agreement under which he pleaded no contest to one felony count of making a place available for the manufacture, storage, or distribution of a controlled substance (Health & Saf. Code, § 11366.5, subd. (a)) and an amended count for misdemeanor transportation of marijuana (§ 11360, subd. (b)). Under the negotiated plea, sentencing would be continued for three years, and if Schwartz obeyed all laws, did not have "any contact" with marijuana, and performed 180 hours of community

service, he would be allowed to withdraw his plea to the felony and be sentenced on the misdemeanor count. The trial court accepted the plea and continued the sentencing hearing for three years.

On September 15, 2016, pursuant to a stipulation by the parties, the trial court ordered Schwartz to pay victim restitution to Valdez in the amount of \$252,408.75. The prosecutor explained as to Valdez's insurance, "I've spoken to the insurance company. Mr. Valdez will subrogate them, but since he is the named victim in the case, he is the one the order has to be made to." Schwartz's counsel referenced negotiations going on with the insurance company, and the court inquired, "So how is that going to affect what we're doing here?" The prosecutor responded, "My understanding is there is a stipulation to this amount [of restitution]. Anything they work outside the criminal justice system, I guess is between them." On October 13, 2016 the court entered an order for victim restitution in the stipulated amount.

C. *Schwartz's Motion To Offset His Victim Restitution Obligation*

On July 19, 2019, prior to being sentenced, Schwartz filed a motion for an offset of his restitution obligation pursuant to Penal Code section 1202.4, subdivision (f)(1),² seeking an offset for the \$244,118.70 payment the insurance company made to Valdez under Valdez's insurance policy. Schwartz argued that although he was not a named insured under the insurance policy, because the commercial lease relieved him of any obligation to maintain insurance to cover the premises, he was an implied-in-

² Further statutory references are to the Penal Code.

law beneficiary under the insurance policy. At the hearing, Schwartz's attorney relied on *People v. Short* (2008) 160 Cal.App.4th 899, 903 (*Short*), arguing Schwartz was in the same position as the defendant employee in *Short*, who was awarded an offset for insurance payments made on his employer's insurance policy even though the defendant was not named as an insured and had not paid the premiums. Schwartz also argued that absent an offset, Valdez would have a windfall resulting from recovery of restitution and the insurance payment.

The prosecutor distinguished *Short* on the basis the defendant in *Short* as an employee was in the class of people intended to be covered under the policy, whereas Valdez's policy covered the building, not Schwartz. The prosecutor also pointed out that Schwartz had violated the agreement by possessing flammable materials and other dangerous substances, chemicals, or devices.

The trial court denied Schwartz's motion, explaining, "I agree that it would be appropriate to offset restitution if it was Mr. Schwartz'[s] insurance company that had paid Mr. Valdez. [¶] The law's quite clear on that. However, I do not agree with the assertion that because Mr. Valdez received proceeds from his own insurance policy, that that somehow relieves Mr. Schwartz of the responsibility to pay restitution. [¶] Not only as a matter of law, but also as a condition of the plea bargain."

Schwartz timely appealed from the order.

DISCUSSION

A. *Standard of Review*

We review a restitution order for an abuse of discretion. (*In re S.O.* (2018) 24 Cal.App.5th 1094, 1098; *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1136 (*Vasquez*); *People v. Phu* (2009) 179 Cal.App.4th 280, 284.) However, a “restitution order ‘resting upon a “demonstrable error of law” constitutes an abuse of the court’s discretion.’” (*People v. Millard* (2009) 175 Cal.App.4th 7, 26; accord, *Vasquez*, at p. 1136.)

B. *Schwartz Is Not Entitled to an Offset to His Obligation To Pay Victim Restitution*

“Under the California Constitution, as amended in 1982 by Proposition 8 (commonly known as The Victims’ Bill of Rights), every crime victim has a right to be compensated by the defendant for losses incurred as a result of the defendant’s crime. (Cal. Const., art. I, § 28, subd. (b)(13).)” (*People v. Martinez* (2017) 2 Cal.5th 1093, 1100.) Consistent with this constitutional provision, section 1202.4, subdivision (a)(1), provides, “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Subdivision (f) of section 1202.4 similarly states, with limited exceptions not applicable here, “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or

victims or any other showing to the court. . . . The court shall order full restitution.”

“While restitution . . . may serve to compensate the victim of a crime, it also addresses the broader probationary goal of rehabilitating the defendant. “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” [Citation.] Restitution ‘impresses upon the offender the gravity of the harm he has inflicted upon another, and provides an opportunity to make amends.’” (*People v. Anderson* (2010) 50 Cal.4th 19, 27; accord, *People v. Martinez, supra*, 2 Cal.5th at p. 1101; *Barickman v. Mercury Casualty Co.* (2016) 2 Cal.App.5th 508, 517 (*Barickman*) [“In addition to compensating the victim, a restitution order is intended to rehabilitate a defendant and deter crime.”].)

“Payments received by a crime victim from his or her insurance company or from an independent third party for economic losses suffered as a result of the defendant’s criminal conduct cannot reduce the amount of restitution the defendant owes.” (*Vasquez, supra*, 190 Cal.App.4th at pp. 1133-1134; accord, *People v. Birkett* (1999) 21 Cal.4th 226, 246 [“[T]he immediate victim was entitled to receive from the probationer the full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses.”]; *Barickman, supra*, 2 Cal.App.5th at p. 518 [“payments received by a crime victim from the victim’s insurance company or from an independent third party such as Medicare for economic losses suffered as a result of the defendant’s criminal conduct cannot reduce the amount of restitution the defendant owes”]; *People v.*

Hume (2011) 196 Cal.App.4th 990, 996 [“Consistent with the statute, payments to the victim by the victim’s *own insurer* as compensation for economic losses attributed to a defendant’s criminal conduct *may not* offset the defendant’s restitution obligation.”]; *People v. Hamilton* (2003) 114 Cal.App.4th 932, 941 [defendant was not entitled to offset for settlement payments made on his mother’s insurance policy to the victim].)

By contrast, as we explained in *Vasquez, supra*, 190 Cal.App.4th at page 1134, “To the extent the defendant has his or her own insurance that has compensated the crime victim for losses included in the restitution order, . . . the defendant is entitled to an offset for the sums paid. [Citation.] ‘The defendant’s own insurance company is different than other sources of victim reimbursement, in that (1) the defendant procured the insurance, and unlike the other third party sources, its payments to the victim are not fortuitous but precisely what the defendant bargained for; (2) the defendant paid premiums to maintain the policy in force; (3) the defendant has a contractual right to have the payments made by his insurance company to the victim, on his behalf; and (4) the defendant’s insurance company has no right of indemnity or subrogation against the defendant. In sum, the relationship between the defendant and its insurer is that payments by the insurer to the victim are “directly from the defendant.”’” (Accord, *Barickman, supra*, 2 Cal.App.5th at p. 518; *People v. Bernal* (2002) 101 Cal.App.4th 155, 167-168.)

Schwartz contends his relationship with Valdez under the lease supports treatment of the insurance payments under Valdez’s insurance policy as if the payments were made directly by Schwartz, relying on *Short, supra*, 160 Cal.App.4th at pages

899 and 903 and *Vasquez, supra*, 190 Cal.App.4th at page 1134. Both cases are distinguishable. In *Short*, the defendant was convicted of driving under the influence of alcohol causing great bodily injury while driving his employer's vehicle in the course of his employment. (*Short*, at pp. 901, 905.) The employer's insurance policies covered the employer and anyone using the employer's vehicle with its permission. (*Id.* at p. 905.) The Court of Appeal observed, "[A]lthough [the defendant's] name is not listed as an insured in either policy, defendant was a member of the class of insureds covered under the policies," and "the insurance company was contractually obligated to compensate the victim on behalf of defendant as well as on behalf of his employer, even though defendant did not procure the policy or make the premium payments." (*Ibid.*) On these facts the court in *Short* concluded the settlement payment by the insurance company was "deemed to be restitution to the victim made directly from defendant within the meaning of section 1202.4." (*Ibid.*; see *People v. Jennings* (2005) 128 Cal.App.4th 42, 56-57 (*Jennings*) [defendant who was required to pay restitution arising from conviction for driving under the influence causing injury was entitled to offset for insurance company's settlement payment to victim on defendant's mother's insurance policy because defendant was named insured even though defendant did not personally procure the policy or pay the premiums].)

In *Vasquez, supra*, 190 Cal.App.4th at page 1128, the defendant was ordered to pay restitution as part of resolution of a criminal case charging him with failure to control a mischievous animal that caused serious bodily injury. The defendant sought an offset for a settlement payment made to the victim by the insurance company that had issued a homeowners' policy to the

defendant's landlord insuring the landlord and the defendant. (*Ibid.*) We declined to reach whether *Short, supra*, 160 Cal.App.4th 899 and *Jennings, supra*, 128 Cal.App.4th 42 were correctly decided, or whether we agreed with *People v. Hamilton, supra*, 114 Cal.App.4th at page 943, which concluded the defendant should not receive an offset for a settlement payment on a policy purchased by the defendant's mother, and the dissent in *Jennings*, at pages 61 to 62. (*Vasquez, supra*, 190 Cal.App.4th at pp. 1136-1137.) We instead concluded the defendant had not met his burden to establish how much of the civil settlement compensated the victim for her medical and other expenses. (*Id.* at pp. 1137-1138.)

We again need not reach whether we agree with the reasoning in *Short* and *Jennings*. In contrast to those cases and *Vasquez*, Schwartz was not a named insured under Valdez's insurance policy, nor were the insurance payments made on his behalf. The fact the lease between Schwartz and Valdez required Valdez to obtain insurance coverage for the building does not make Schwartz "a member of the class of insureds covered under" the policy. (*Short, supra*, 160 Cal.App.4th at p. 905.)

Schwartz alternatively argues, relying on *Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co.* (1976) 59 Cal.App.3d 860 (*Liberty Mutual*), that he is entitled to an offset because Schwartz was an "implied-in-law" beneficiary under Valdez's insurance policy arising from Valdez's obligation under the lease to obtain insurance coverage for the premises. Schwartz's reliance on *Liberty Mutual* is misplaced. There, a building tenant operated a manufacturing plant pursuant to a sublease of the premises. The sublease provided that a portion of the rent paid by the tenant would be used to pay the premium on

an insurance policy covering the premises to satisfy the sublessor's obligation under its lease with the lessor, which was the named insured. Further, the sublessor told the tenant it did not need to obtain its own fire insurance in light of the insurance policy. After the insurance company paid the lessor for the fire damage, it filed a subrogation action against the tenant to recover the cost of repairs. (*Id.* at pp. 863-864.) The Court of Appeal concluded the insurance company had no right to recover from the tenant because the insurance company in its subrogation action stood in the shoes of the lessor, and the lessor had agreed under the lease to look to the insurance policy to recover for any fire damage to the building. (*Id.* at pp. 864-865.) The *Liberty Mutual* court explained, "[U]nder the facts of this case, we regard the [tenant . . . as an implied in law co-insured of [the lessor], absent an express agreement between them to the contrary. They both had insurable interests in the fire-damaged building. [Citation.] [¶] If subrogation were permitted here, [the tenant], rather than the proceeds of Liberty's policy, would become the source of the funds used to repair the fire damage." (*Id.* at p. 865.) Although the lease at issue here provided for Valdez to obtain insurance to cover fire damage to the building, unlike the sublease in *Liberty Mutual*, the lease did not provide for Schwartz's rent to cover the premiums on the insurance policy. Further, Valdez did not represent to Schwartz that he did not need to obtain his own insurance coverage to cover any damage to the building. And significantly, *Liberty Mutual* did not involve an offset to court-ordered restitution, and therefore

the court did not address the policies behind the statutory requirement a defendant compensate the victim of a crime.³

Schwartz's argument reversal is required to avoid a windfall to Valdez also lacks merit. It is true "[a]n order of restitution is not intended to provide the victim with a windfall." (*In re S.E.* (2020) 46 Cal.App.5th 795, 809; accord, *People v. Sharpe* (2017) 10 Cal.App.5th 741, 746.) However, "[a] crime victim who has been compensated for the same economic losses by both the defendant and his or her own insurance company may be subject to a separate claim for reimbursement by the insurer." (*Vasquez, supra*, 190 Cal.App.4th at p. 1134, fn. 7; see *People v. Birkett, supra*, 21 Cal.4th at p. 246 ["Third parties other than the [restitution] [f]und, such as private insurers, who had already reimbursed the victim were thus left to their separate civil remedies, if any, to recover any such prior indemnification either from the victim or from the probationer."].)

At the time Schwartz agreed to pay victim restitution, the prosecutor noted he had spoken to the insurance company, and "Valdez will subrogate them, but since he is the named victim in the case, he is the one the order has to be made to." Further, even if the insurance company does not seek restitution from

³ Schwartz points to section K of the insurance policy, which provided that the insurance company had a right to subrogation of Valdez's claim against a third party but stated Valdez could waive his right to recovery in specified circumstances, including against a tenant. But Schwartz did not introduce any evidence that Valdez had waived his right to recover against Schwartz, and thus the insurance company retained its subrogation right to "recoup its payments directly from the tortfeasor or from the proceeds of the insured's action against a tortfeasor." (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 550.)

Valdez, “the possibility that the victim may receive a windfall because the third party fails to exercise its remedies does not diminish the victim’s right to receive restitution of the full amount of economic loss caused by the perpetrator’s offense.” (*People v. Duong* (2010) 180 Cal.App.4th 1533, 1537-1538; accord, *People v. Hove* (1999) 76 Cal.App.4th 1266, 1272-1273 [restitution order was proper “even though the victim could conceivably profit from recovering restitution if defendant complies with the restitution order and if Medicare and/or Medi-Cal does not pursue reimbursement”].)

DISPOSITION

The order denying the offset is affirmed.

FEUER, J.

We concur:

SEGAL, Acting P. J.

RICHARDSON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.